

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LONNIE JACKSON, and
DIAMOND COLEMAN,

No. 16-CR-2362-WJ
No. 16-CR-2363-WJ

Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING IN PART DEFENDANT'S MOTION TO STRIKE PORTIONS OF
THE UNITED STATES' SEALED REPLY TO THE DEFENDANT'S RESPONSE
TO THE GOVERNMENT'S MOTION TO RECONSIDER

THIS MATTER comes before the Court upon Defendant's Motion to Strike Portions of the United States' Sealed Reply to the Defendant's Response to the Government's Motion to Reconsider, or in the Alternative, to Grant Leave to File a Surreply (**Doc. 104**, filed 7/27/18, **Doc. 103**, filed 8/1/18). Defendants' Motion is well-taken, and therefore, is **GRANTED IN PART** to the extent that Exhibit 61 is stricken.

Pursuant to the status conference on April 9, 2018, the United States filed its Motion to Reconsider (Doc. 89) the Memorandum Opinion and Order by Senior Judge M. Christina Armijo (Doc. 72), to which Defendants filed their response brief (Doc. 97). The Government then submitted its reply brief (Doc. 101) and included with its reply brief the previously undisclosed Exhibit 61, which the Government purports to be a "chi square analysis." Doc. 101-1, Ex. 61. The Government claims this exhibit supports its position that "the black defendants had more criminal history than [sic] the other groups proportionately." Doc. 101 at 7. Defendants take issue with this exhibit because it includes new material not previously submitted to the Court, and

Defendants ask this Court to decline to consider the contents or conclusions of the chi-square analysis. Docs. 103, 104. In the alternative, Defendants request leave to file a surreply. *Id.*¹

The Court agrees with Defendants that the general rule is that “[w]here a reply contains new material or argument, courts must either refrain from relying on the new material or argument in ruling on the motion, or permit a surreply.” *Rowley v. APD Detective Kevin Morant*, No. 10CV1182 WJ/GBW, 2014 WL 12656606 (D.N.M. June 27, 2014) (citing *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir. 1998)). Furthermore, the Tenth Circuit has ruled that, in accordance with *Beaird*, a district court “abuse[s] its discretion to the extent it relie[s] on new evidentiary materials presented for the first time in [a] reply brief.” *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003).

The Government’s new exhibit was not part of the original analysis in the Memorandum Opinion and Order by Senior Judge M. Christina Armijo (Doc. 72), which is the subject of the Government’s current Motion to Reconsider. As far as the Court is concerned, the Government’s Exhibit 61 therefore does not change the analysis on the Motion to Reconsider. Thus, the exhibit itself would make no difference in the Court’s analysis at this time and the Court will not now consider the new exhibit submitted in the Government’s reply brief (Doc. 101-1, Exhibit 61).

In regards to Defendants’ assertion that the Government raises a new argument in its reply brief, i.e. that the African-American defendants “had more voluminous or worse criminal histories than other ethnic or racial groups arrested in the Surge,” Doc. 104, it is not clear to the Court that the Government has not made that argument on the record before. The Court will, therefore, not strike that specific argument; the Court will not now, however, consider Exhibit 61 to support the position that the African-American defendants had more voluminous or worse criminal histories than other defendants.

¹ Shortly before this Order was e-filed, the Government filed its response indicating it does not oppose Defendants’ Motion. Doc. 105.

For these reasons, the Court **GRANTS IN PART** Defendant's Motion to Strike Portions of the United States' Sealed Reply to the Defendant's Response to the Government's Motion to Reconsider. (**Docs. 103, 104**). **Exhibit 61 is stricken** and the remainder of the Government's Reply brief (Doc. 101) is unaffected.

IT IS SO ORDERED.



CHIEF UNITED STATES DISTRICT JUDGE